

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDREA MELISANDE ALTHEIMER,)	
)	
Petitioner,)	CASE NO. C05-1580-RSM-MJB
)	
v.)	
)	
BELINDA STEWART,)	REPORT AND RECOMMENDATION
)	
Respondent.)	
_____)	

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner is a state prisoner who is currently incarcerated at the Washington Corrections Center for Women in Gig Harbor, Washington. She seeks relief under 28 U.S.C. § 2254 from her 1998 King County Superior Court conviction. Respondent has filed an answer to the petition together with relevant portions of the state court record. Respondent argues in her answer that the petition is untimely. Petitioner has filed a response to respondent's answer in which she argues that she is entitled to equitable tolling of the statute of limitations. Respondent, at the Court's direction, filed a reply brief in which she addresses petitioner's equitable tolling argument. The Court, having reviewed the briefs of the parties, and the balance of the record, concludes that this action should be dismissed as untimely under 28 U.S.C. § 2244(d).

(Dkt. No. 4.) Petitioner signed her amended petition on September 29, 2005, and it was received by the Court for filing on October 6, 2005. (Dkt. No. 7.)

DISCUSSION

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) which worked substantial changes in the law of federal post conviction relief. One of those changes was to adopt a one year statute of limitations for § 2254 actions. *See* 28 U.S.C. § 2244(d)(1) (1996). The one year limitations period starts to run from the date of the conclusion of direct review or “the expiration of the time for seeking such [direct] review,” whichever is longer. *Id.*

In this case, the period for direct review ended, at the latest, upon the expiration of the period for filing a petition for writ of certiorari with the United States Supreme Court. *See Bowen v. Roe* 188 F.3d 1157, 1158-59 (9th Cir. 1999). The Supreme Court of Washington denied petitioner’s petition for review on May 1, 2002. Petitioner had 90 days after the entry of that ruling (as opposed to the issuance of the state mandate), or until approximately July 30, 2002, to file a petition for a writ of certiorari in the United States Supreme Court. *See* Rules 13.1 and 13.3 of the Rules of the Supreme Court of the United States. Because petitioner did not file a petition for certiorari, her conviction became final on or about July 30, 2002. 28 U.S.C. § 2244(d)(1)(A). Petitioner’s one year statute of limitations began to run on the following day. *See Corjasso v. Ayers*, 278 F.3d 874, 877 (9th Cir. 2002).

The one year limitations period is tolled for any properly filed collateral state challenge to the state conviction. 28 U.S.C. § 2244(d)(2). Thus, the statute of limitations was tolled from April 29, 2003, the date petitioner signed her motion for relief from judgment, to September 30, 2004, the date the Supreme Court denied petitioner’s motion for discretionary review in her personal restraint proceedings. Between July 31, 2002, the date the statute of limitations began to run, and April 29,

1 2003, 272 days ran on the statute of limitations. The statute of limitations began to run again on
2 October 1, 2004, the day after petitioner's motion for discretionary review in her personal restraint
3 proceedings was denied by the Supreme Court, and expired 93 days later, on or about January 2,
4 2005.

5 The statute of limitations is also subject to equitable tolling. *Miranda v. Castro*, 292 F.3d
6 1063, 1066 (9th Cir. 2002). However, the Ninth Circuit has made clear that the statute of limitations
7 may be equitably tolled only if "extraordinary circumstances beyond a prisoner's control make it
8 impossible to file a petition on time." *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003) (citing
9 *Brambles v. Duncan*, 330 F.3d 1197, 1202 (9th Cir. 2003)). The Ninth Circuit has also made clear
10 that equitable tolling is justified in very few cases, noting that "the threshold necessary to trigger
11 equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule." *Miranda*, 292
12 F.3d at 1066 (citation omitted). A petitioner bears the burden of showing that equitable tolling
13 should be applied. *Id.* at 1065.

14 Petitioner argues in her response to respondent's answer that she is entitled to equitable
15 tolling of the limitations period because she has exercised due diligence in filing past pro se briefs
16 and because the instant petition, if deemed untimely, is untimely due to no fault of her own.
17 Specifically, petitioner asserts that WCCW law librarian Luan Vu, contract attorney Darrel Lahtinen,
18 and law professor Marc Lampson, all advised her that she had one year to file her federal habeas
19 petition after exhausting *all* of her state remedies, including her personal restraint petition. Petitioner
20 asserts that this misinformation, provided by state contract employees, was the cause of her failure to
21 file a timely habeas petition and that this therefore constitutes one of those "rare cases" where
22 equitable tolling is appropriate.

23 Respondent, at this Court's direction, filed a reply brief in which she addresses petitioner's
24 equitable tolling argument. Respondent argues that petitioner's reliance on erroneous advice from
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1 the WCCW law librarian, the WCCW contract attorney, and the law professor who taught a legal
2 research class to inmates at WCCW, does not constitute an “extraordinary circumstance” entitling
3 petitioner to equitable tolling. In support of this argument, respondent cites to Ninth Circuit cases
4 which have held that counsel’s miscalculation of the AEDPA limitations period, and counsel’s
5 negligence in general, do not constitute “extraordinary circumstances” warranting equitable tolling.
6 *Miranda v. Castro*, 292 F.3d 1063, 1067 (9th Cir. 2002); *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th
7 Cir. 2001).

8 Respondent also cites to cases from other circuits which have held that a prisoner’s ignorance
9 of the law, and pro-se status, do not constitute extraordinary circumstances for purposes of equitable
10 tolling. *See, e.g., Shoemate v. Norris*, 390 F.3d 595, 598 (8th Cir. 2004) (“pro se status, lack of legal
11 knowledge or legal resources, confusion about or miscalculations of the limitations period, or the
12 failure to recognize the legal ramifications of actions taken in prior post conviction proceedings are
13 inadequate to warrant equitable tolling”); *Marsh v. Somares*, 223 F.3d 1217, 1220 (10th Cir. 2000)
14 (neither ignorance of the law nor delay caused by law clerks working through prison legal access
15 system warrant equitable tolling). *See also, Nunez v. Robert*, 2006 WL 181683 (S.D. Ill.) (Jan. 24,
16 2006) (neither inadequate knowledge of the law nor reliance on faulty advice provided by civilian
17 paralegal and inmate law clerk amount to extraordinary circumstances warranting equitable tolling).

18 While petitioner argues that she relied to her detriment on the information provided by the
19 law librarian at WCCW, and others, the evidence she provides in support of this argument suggests
20 that she sought, and received, that misinformation after the statute of limitations had already expired.
21 Petitioner’s kite to Mr. Vu asking how long she had to prepare her federal habeas petition was dated
22 August 2, 2005. (Dkt. No. 23, Ex. 2.) Petitioner’s meeting with Mr. Lahtinen, at which she
23 apparently discussed the filing of a federal habeas petition, occurred on October 18, 2005, and Mr.
24 Lahtinen’s subsequent letter containing the incorrect information was dated December 9, 2005. (*Id.*,

1 Ex. 4a.) It cannot be said that petitioner relied to her detriment on the misinformation provided by
2 these individuals if, at the time she sought the information, she was already foreclosed from filing a
3 federal habeas petition.

4 Even assuming petitioner could establish that she had timely sought this information, the fact
5 that the information was incorrect does not entitle her to equitable tolling. There is nothing in the
6 record to suggest that the state, through its employees, actively hindered petitioner's ability to pursue
7 her federal habeas action. Had petitioner received the same incorrect information from her own
8 counsel, she would not be entitled to equitable tolling. *See Miranda, supra; Frye, supra.* The fact
9 that she received the incorrect information from individuals affiliated in some fashion with the state
10 does not change the result. Petitioner has not persuaded this Court that extraordinary circumstances
11 beyond her control made it impossible for her to file her federal habeas petition on time. Thus,
12 petitioner has not demonstrated that she is entitled to equitable tolling of the statute of limitations.

13 Because the statute of limitations expired on or about January 2, 2005, and because petitioner
14 did not sign her federal habeas petition until almost nine months later, on September 29, 2005,
15 petitioner's federal habeas petition is untimely and the petition and this action should therefore be
16 dismissed, with prejudice, under 28 U.S.C. § 2244(d). A proposed order accompanies this Report
17 and Recommendation.

18 DATED this 14th day of July, 2006.

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22 MONICA J. BENTON
23 United States Magistrate Judge
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